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No. 79-253

In the Supreme Court of the United States

OCTOBER TERM, 1978

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the district court (App. B, *infra*, 3a-13a) is not yet reported. The decision of the administrative law judge (App. D, *infra*, 16a-28a) is not reported.

JURISDICTION

The judgment of the district court was entered on May 7, 1979 (App. A, *infra*, 1a-3a). A notice of

appeal to this Court was filed on May 17, 1979 (App. C, *infra*, 14a-15a). On July 12, 1979, the Chief Justice extended the time for docketing the appeal to and including August 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether Section 16(e) of the Fair Labor Standards Act, which authorizes civil penalties for violations of the Act's child labor provisions, violates the Due Process Clause of the Fifth Amendment because it permits sums collected as civil penalties to be applied toward reimbursement of the costs of enforcing the child labor laws.

2. Whether, if the provision of Section 16(e) relating to the use of civil penalty funds violates due process, that provision is severable from the remainder of the section.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Section 16(e) of the Fair Labor Standards Act, 29 U.S.C. 216(e), provides in pertinent part:

> Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall

> be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. * * * Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title.

29 U.S.C. 9a provides:

> All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States.

STATEMENT

1. Section 12 of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 212, prohibits the employment of "oppressive child labor," as defined in the statute and regulations promulgated by the Secretary of Labor. In 1974 Congress amended the Act to add Section 16(e), 29 U.S.C. 216(e), which authorizes the Secretary to assess a civil penalty of not more than $1,000 for each violation of the child labor provisions.[1] Section 16(e) directs the Secretary, in determining the amount of the penalty, to consider "the size of the business of the person charged and the gravity of the violation * * *."

When the Secretary or his delegate assesses a penalty against an employer, Section 16(e) and its implementing regulations give the employer a right to file exceptions to the assessment. In that event the existence of the violation and the amount of the penalty are determined de novo by an administrative law judge, after a hearing conducted pursuant to the Administrative Procedure Act (5 U.S.C. 554), in which the Secretary bears the burden of proof (29 C.F.R. 580.21(a)). The decision of the administrative law judge constitutes the final administrative decision on the matter (29 C.F.R. 580.32), and thereafter, an employer aggrieved by that decision may obtain judicial review (5 U.S.C. 702, 704).

[1] Section 25(c) of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. Before the 1974 amendment the Act provided, and still provides, an injunctive remedy against child labor violations (29 U.S.C. 212(b), 217) and for criminal penalties in the case of willful violations (29 U.S.C. 216(a)).

Section 16(e) further provides that "[s]ums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title." 29 U.S.C. 9a, in turn, provides that sums collected "shall be deposited to the credit of the appropriation" of the office within the Department of Labor which supervised the work and that such funds "may be used, in the discretion of the Secretary of Labor," to meet the expenses of that office.

The Secretary has delegated his responsibility for enforcing the child labor provisions of the Act to the Employment Standards Administration (ESA). 36 Fed. Reg. 8755 (1971). The authority to assess civil penalties is exercised by ESA's assistant regional administrators.

2. Appellee operates a chain of restaurants in the southeastern United States (App. B, *infra*, 4a). In 1975, following an investigation, the ESA assistant regional administrator in the Atlanta regional office found that appellee had committed 169 separate violations of the child labor laws. He assessed civil penalties against appellee totalling $103,000. Appellee filed exceptions to the determination of the violations. After a hearing, the administrative law judge concluded that the existence of the violations was clearly established, but he reduced the

amount of the penalties to $18,500 (App. D, *infra*, 27a-28a).[2]

Appellee did not seek judicial review of the administrative law judge's ruling and, indeed, has never challenged the merits of that decision. Instead, it filed this action in the United States District Court for the District of Columbia, seeking a declaratory judgment that Section 16(e) is unconstitutional and an injunction prohibiting its enforcement. Appellee contended that the reimbursement provisions of the statute (and, by reference, 29 U.S.C. 9a), which authorize the allocation of civil penalty funds to the offices that investigate and assess penalties for child labor violations, create an impermissible risk of bias, in violation of the Due Process Clause.

The record developed in the district court established the following facts, which appellee did not dispute. Under the statutory scheme, the amount of monies collected as child labor penalties does not affect the compensation of any official involved in the assessment of those penalties or the investigation of the underlying violations.[3] For fiscal years 1976, 1977 and 1978, ESA collected the following approximate

[2] The assistant regional administrator had assessed an additional $84,500 because he regarded the violations as willful. The violations were of the same type as those that had been disclosed in the course of several previous investigations of appellee's premises. The administrative law judge decided, however, that the company did not have sufficient reason to know that the violations were recurring (App. D, *infra*, 26a-27a).

[3] Defendants' Answer to Plaintiff's Interrogatory No. 2(h).

amounts in child labor civil penalties: $151,000 (FY 1976), $650,000 (FY 1977), and $592,000 (FY 1978).[4] In each year, these amounts constituted less than one percent of the total funds appropriated to ESA by Congress.[5] Furthermore, in each of those years, ESA failed to spend the full amount appropriated to it, and the unexpended monies were returned to the Treasury. Indeed, in each of the three years the amounts lapsed to the Treasury substantially exceeded the amounts collected in child labor penalties.[6] In other words, while it is theoretically possible for the challenged provisions of 29 U.S.C. 216(e) and 9a to increase the monies available to ESA in a fiscal year beyond those appropriated to it by Congress, they have never had that effect.

In FY 1976 ESA allotted the amounts collected in child labor penalties to the ESA national office. In FY 1977 ESA allotted the penalties collected to the national office, to the Office of the Solicitor of Labor, and to the several regional offices in proportion to the amounts expended by those offices on child labor enforcement. The Atlanta Regional Office received

[4] Defendant's Answer to Plaintiff's Interrogatory No. 2(a). The fiscal year runs from October 1 to the following September 30. Although Section 16(e) became effective on May 1, 1974, no penalties were collected prior to July 15, 1975.

[5] *Budget of the United States Government, Fiscal Year 1979—Appendix*, pages 623-624; *Budget of the United States Government, Fiscal Year 1978—Appendix*, page 510.

[6] Defendants' Answer to Plaintiff's Interrogatory No. 2(b). In FY 1976, $981,000 lapsed to the Treasury; in FY 1977, $870,000; in FY 1978, approximately $4,600,000.

$39,200.[7] In FY 1978 and FY 1979 ESA has held the penalties collected in the Treasury.[8]

Without disputing these facts, appellee moved for summary judgment, and the district court granted the motion. Relying on *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the court held that the provision of Section 16(e) relating to the use of civil penalties "creates a situation in which bias may creep into the decisions of the regional officials who impose those penalties" (App. B, *infra*, 12a), in violation of the Due Process Clause (*id.* at 13a).

The district court appears to have reasoned that under the reimbursement provision of Section 16(e) an ambitious assistant regional administrator, motivated by a desire to enlarge his bureaucratic domain, would have an incentive to assess a substantial penalty against a child labor violator in the expectation, or hope, that a portion of the penalties collected would be returned to his office. This additional funding, the court apparently believed, would enable the administrator to devote more resources to (and perhaps hire

[7] Defendants' Answer to Plaintiff's Interrogatory No. 2(c). See also App. B, *infra*, 9a n.6. The record does not indicate whether those allotments served to increase the funds that would otherwise have been available to each office for expenditure in that year. Although the Department of Labor's annual appropriation specifies the amount earmarked for ESA, it does not specify the amount given to each of ESA's regional offices.

[8] *Ibid.*

more personnel for) child labor enforcement, which would in turn uncover more violations and generate even larger penalties (see App. B, *infra*, 7a-9a).

The district court acknowledged that the assessment of penalties by the assistant regional administrator is subject to a de novo determination by an administrative law judge, that the Office of Administrative Law Judges receives no allotment of any portion of the child labor penalties, and that there is thus no due process violation at the administrative law judge level (App. B, *infra*, 10a). It nevertheless concluded that that fact did not purge the statutory scheme of the alleged taint, because "unfairness at the 'trial' level cannot be corrected by the existence of appeal procedures, or even by the availability of a trial *de novo*" (*ibid.*).

Finally, although the district court held that it was the reimbursement provision of Section 16(e) alone that rendered the civil penalty statute unfair, and although it stated that it would be "simple and constitutionally sound [to] pay all civil money penalty funds directly into the Treasury of the United States" (App. B, *infra*, 12a), the court did not limit its relief to declaring unconstitutional, and enjoining the enforcement of, the reimbursement provision. Instead, it permanently enjoined appellants "from enforcing section 16(e) * * * against [appellee] * * * and from requiring payment of the civil money penalties assessed against it" (App. A, *infra*, 1a-2a; see also App. B, *infra*, 13a).

THE QUESTIONS ARE SUBSTANTIAL

The district court has held unconstitutional a significant component of a major federal statute protecting the nation's children from exploitation in the labor market.[9] The civil penalty sanctions of Section 16(e) of the Fair Labor Standards Act are an important deterrent to violations of the Act's child labor provisions, and the district court's decision, if not overturned, will seriously impair the effective enforcement of those provisions. That consequence is sufficiently substantial to warrant plenary review by this Court.

Moreover, the district court's decision is incorrect in three respects. First, we submit that the due process standards established in cases such as *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), are applicable only to officials exercising judicial or quasi-judicial functions. The court erred in applying those standards to the initial assessment of penalties by an ESA assistant regional administrator, which is an essentially prosecutive function. This is an important is-

[9] Enforcement of the child labor laws is one of the principal responsibilities of the Employment Standards Administration. In FY 1977 ESA investigations revealed that more than 16,000 children in over 2,000 establishments were illegally employed. United States Department of Labor, *Minimum Wages and Maximum Hours Standards Under the Fair Labor Standards Act: An Economic Effects Study Submitted to Congress*, 28-29 (1978).

This Court's decisions concerning the validity of the federal child labor laws are, of course, landmarks in our constitutional history. *United States* v. *Darby*, 312 U.S. 100 (1941); *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).

sue that has implications beyond the child labor law context. Second, even if the principles announced in *Ward* and *Tumey* are applicable here, the court erred in concluding that the statutory scheme creates a sufficient risk of personal bias to violate due process. The likelihood that a penalty assessment under Section 16(e) will be the product of bias could hardly be more remote and attenuated. Finally, even if the reimbursement provision of the statute creates a sufficient risk of bias to violate due process, the court erred in enjoining enforcement of Section 16(e) in toto. Instead, it should have severed the reimbursement provision from the rest of Section 16(e) and enjoined only the enforcement of that provision.

1. In *Tumey* v. *Ohio*, *supra*, and *Ward* v. *Village of Monroeville*, *supra*, this Court reversed criminal convictions handed down by village mayors sitting as judges of the mayor's court. The Court held that the convictions violated due process because, in *Tumey*, the mayor received a portion of the fines and costs he levied as personal income, and, in *Ward*, the mayor had primary fiscal and executive responsibility for the village, which was dependent on the fines he imposed for nearly half its revenue. Those circumstances, the Court held, created situations "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused * * *." *Tumey* v. *Ohio*, *supra*, 273 U.S.

at 532; *Ward* v. *Village of Monroeville, supra,* 409 U.S. at 60.

Tumey, Ward and other cases in which this due process standard has been applied clearly indicate, we submit, that the standard is applicable only to officials exercising adjudicative functions, which ordinarily entail deciding disputes based on evidence and arguments presented by other adverse parties. Thus, in *Tumey* the Court followed the "general rule" that "officers *acting in a judicial or quasi-judicial capacity* are disqualified by their interest in the controversy to be decided * * *," and it explained the rule in terms of "a possible temptation to the average man *as judge* * * *." 273 U.S. at 522, 532 (emphasis added). And in *Ward,* the Court stated that "[t]he issue turns * * * on whether the Mayor can be regarded as an impartial *judge.*" 409 U.S. at 59 (emphasis added). Similarly, the Court has remarked that these due process principles apply to "administrative agencies *which adjudicate* as well as to courts." *Withrow* v. *Larkin,* 421 U.S. 35, 46 (1975) (emphasis added). See also *Connally* v. *Georgia,* 429 U.S. 245 (1977), invalidating a scheme in which "the defendant is subjected to what surely is judicial action by an officer of a court who has a 'direct, personal, substantial, pecuniary interest' " in the matter (*id.* at 250, quoting from *Tumey* v. *Ohio, supra,* 273 U.S. at 523). See also *Bevan* v. *Krieger,* 289 U.S. 459, 465-466 (1933).

ESA assistant regional administrators are not adjudicators, and in assessing child labor penalties

in the first instance they are not acting in a judicial or quasi-judicial capacity. Rather, they are exercising what is in effect a prosecutive function; their action is no different in substance than a government attorney's determination of what charges to bring in an indictment or what relief to seek in a civil complaint.

Adjudication comes after assessment, not before. An employer who disputes an assessment is entitled to a de novo hearing before an impartial administrative law judge. It is the latter who adjudicates the dispute in a proceeding in which the assistant regional administrator acts as the complaining party. Indeed, the fact that the assistant regional administrator's role is essentially prosecutive and not adjudicative is emphasized by the Secretary's regulations, which state that the notice of penalty assessment and the exceptions filed to it "shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding" (29 C.F.R. 580.3(b)) and provide that the burden of proof shall be upon the Secretary (or his delegate) (29 C.F.R. 580.21(a)).

The district court recognized that the hearing before an administrative law judge fully satisfies the requirements of due process, because the reimbursement provision of Section 16(e) has no possible effect on the Office of Administrative Law Judges (App. B, *infra,* 10a). It concluded, nevertheless, that fairness at the administrative law judge level did not cure what it viewed as impermissible bias at the

assessment stage, and it relied on this Court's holding in *Ward* that the absence of a neutral and detached judge at the first level of adjudication could not be remedied bv the availability of a second, de novo, level of adjudication (*ibid.*). See 409 U.S. at 61-62. But this principle has no application to the assessment process which, as we have already noted, is not a level of adjudication at all.[10]

Thus, to the extent that the district court's decision was based on its view that the initial penalty assessment is equivalent or comparable to an adjudication at the first, or "trial," level, the court misconceived the statutory scheme. To the extent that the decision may have been based on the court's view that the due process standards established in *Ward* and *Tumey*

[10] The fact that Section 16(e) provides that the initial penalty assessment by the Secretary's delegate "shall be final" unless the employer files exceptions to it is not significant in determining whether the assessment is a judicial function. Under the statutory scheme, an employer's failure to file exceptions constitutes a consent to the assessment and is no different than a defendant's failure to contest civil or criminal charges filed in court by a prosecutor or plaintiff. Indeed, in *Ward*, this Court recognized that, even with respect to officials exercising clearly judicial functions, there may be an important distinction between the determination of undisputed charges and adjudication of those same charges in a contested case. The Court there stressed that the question presented concerned "the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where he elects to contest the charges against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official * * * to accept a free and voluntary plea of guilty * * * or the like." 409 U.S. at 62 n.2.

are applicable to non-judicial, prosecutive functions, we submit that the Court erred as a matter of law. Furthermore, the latter view, if accepted, would have significant implications beyond the context of this case.

Officials exercising prosecutorial functions, whether at the administrative or judicial level, are not and should not be expected to be totally "neutral and detached judge[s]" of their own cases. *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 62. This Court has often recognized that prosecutors must have broad discretion in framing charges and requesting remedies (see, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978)), and in doing so they may often be motivated by the kind of general ambition that the district court believed to be impermissibly fostered by the reimbursement provision of Section 16(e). Although there unquestionably are constitutional limits to the discretion and partisanship of prosecutors, our adversary system presumes that government attorneys have at least some interest in the success of their cases, and certainly have an interest greater than those responsible for adjudicating the cases. See *Withrow* v. *Larkin*, *supra*, 421 U.S. at 51-53. A holding that the standards of impartiality that this Court has applied to officials exercising judicial functions must apply equally to those exercising prosecutive functions would be incompatible with the very nature of our system.

2. Even if the standards announced in *Tumey* and *Ward* are applicable to the civil penalty assessment

stage, the district court misapplied them. The due process determination turns upon whether the alleged influencing factor is sufficiently proximate and substantial to create a significant risk of bias. That risk is insignificant here.

Dugan v. *Ohio*, 277 U.S. 61 (1928), which this Court distinguished in *Ward* (409 U.S. at 60-61), illustrates the point. In *Dugan*, the Court upheld a mayor's court conviction against a due process challenge. As in *Ward*, the fine imposed by the mayor in *Dugan* accrued directly to the city treasury. But, unlike in *Ward* or *Tumey*, where the mayor had "wide executive powers," the mayor in *Dugan* had "no executive, and exercised only judicial, functions." *Dugan* v. *Ohio*, *supra*, 277 U.S. at 63. The city manager, not the mayor, was the "active executive"; the mayor was simply one member of a five-person commission that exercised all legislative and, together with the city manager, all executive powers. Moreover, although the mayor's salary was "paid out of a fund to which fines accumulated from his court * * * contribute, it is a general fund, and he receives his salary in any event, whether he convicts or acquits." *Id.* at 65. In these circumstances, the Court held that the mayor's relationship to the city's "executive or financial policy" was too "remote" to impute bias to him in his capacity as judge. *Ibid.* See also *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 61.[11]

[11] Similarly, in *Bevan* v. *Krieger*, *supra*, the Court upheld a state statute that authorized a notary public to imprison for contempt any witness who refused to testify at a deposition. The statute was challenged on the ground that the notary, who was paid for the testimony he transcribed, had a personal interest in compelling testimony, but the Court rejected the claim, holding that the notary's possible interest was "too remote and incidental to vitiate his official action." 289 U.S. at 466. With particular significance to this case, the Court also observed (*ibid.*): "Moreover [the notary's] action lacks the finality which attached to the judgment in the *Tumey* case, as it is subject to review [under the state statute]."

Although the district court correctly recognized that "the crucial consideration is the remoteness of the pecuniary interest" (App. B, *infra*, 6a), it erred in striking down the civil penalty statute. The risk of bias created by the reimbursement provision of Section 16(e) is substantially less than that involved in *Tumey* and *Ward*, and, indeed, is considerably more remote than the danger of prejudice held to be constitutionally insignificant in *Dugan*.

Unlike in *Tumey*, no ESA official has a personal financial stake in his decision. See also *Connally* v. *Georgia*, *supra*; *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973). There is no allegation that sums collected as civil penalties increase the salaries of the administrators who assess them. In addition, unlike in *Ward*, there is no realistic possibility that an official's "executive responsibilities" (409 U.S. at 60) would influence his judgment in assessing penalties. Assistant regional administrators have no budgetary functions; the penalties recovered do not accrue directly to their offices, but rather are paid into a fund at ESA's national office in Washington, which determines whether and how to use them; and these sums constitute a minute fraction—less than one percent—

of ESA's national budget. In fact, as noted above, far from being fiscally dependent upon receipt of the penalties, ESA has each year lapsed unobligated funds to the Treasury in amounts greater than it has collected as civil penalties. See page 7 and note 6, *supra*. As in *Dugan*, then, the official's "relationship to the finances and financial policy" of the body that receives the funds is "too remote to warrant a presumption of bias." *Ward* v. *Village of Monroeville*, *supra*, 409 U.S. at 60-61.

Indeed, even if an assistant regional administrator were aware of the reimbursement provision of Section 16(e), it is difficult to imagine how the statute would be likely to influence the level of penalties he decides to assess. Under the statutory scheme, when ESA allocates child penalty funds to its regional offices—and it has done so in only one year since Section 16(a) was enacted (see page 7, *supra*)—it does so in proportion not to the level of penalties initially assessed by those offices but to the amount of money expended in investigating and prosecuting child labor violations. Thus, the decision to assess a heavy penalty could not increase the allocation to the assessing official's office. It is perhaps conceivable that an assistant regional administrator would decide to expend more resources (*e.g.*, by hiring more investigators) than his own budget would otherwise permit in the hope that those expenditures would be funded by allocations from the monies recovered as a result of his own penalty assessments. But any such possibility rests on a series of increas-

ingly improbable assumptions,[12] and it falls far short of creating the substantial risk of personal bias that violates the Due Process Clause.

3. Assuming that the reimbursement provision of Section 16(e) is unconstitutional, the district court should have severed that provision and given effect to the remainder of the statute. The reimbursement provision is but an incidental part of Section 16(e), whose basic purpose and effect is to subject child labor violators to civil penalties. Yet the court's order declares the statute unconstitutional in its entirety and permanently enjoins its enforcement against appellee (App. A, *infra*, 1a-2a).

This decision conflicts with the settled rule that:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

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[12] This possibility, which the district court apparently believed was significant, would require the assumptions that the assistant regional administrator would be authorized by Congress to increase the size of his staff, that the administrator's superiors would permit him to increase child labor enforcement expenditures significantly in excess of his budget; that the regional office's pro rata portion of the aggregate penalty fund would be sufficient to cover those expenditures but would not be sufficient in the absence of that office's contributions to the fund; that the increased expenditures would uncover a correspondingly increased number of violations; that the administrative law judges would concur with the official's biased penalty assessments; and that ESA budget officers would decide in that year to allocate penalty funds to the regional offices.

Champlin Refining Co. v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). See also *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). Here, it is apparent that the reimbursement provision is severable from the remainder of the statute and that what remains is "fully operative as a law." Moreover, there is strong evidence that Congress would have enacted Section 16(e) without the reimbursement provision rather than have no civil penalty enforcement system at all.

First, Congress has expressed its intent by including a broad severability clause in the Fair Labor Standards Act. See 29 U.S.C. 219.[13] As this Court has remarked with respect to a similar clause: "Congress has thus said that * * * when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced." *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938).

Second, the legislative history of Section 16(e), although not extensive, makes clear that the dominant, if not exclusive, purpose of the section is to strengthen enforcement of the child labor laws. The reimbursement provision contributes little if anything to the achievement of that goal; indeed, the legislative history contains no reference to that provision at all. See S. Rep. No. 93-690, 93d Cong., 2d Sess. 29 (1974); 119 Cong. Rec. 14453 (1973) (remarks of Senator Dominick).

[13] That section provides:

> If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Finally, Congress has not included a similar reimbursement provision in analogous civil penalty statutes, such as the Occupational Safety and Health Act (29 U.S.C. 667(k)) or the Coal Mine Health and Safety Act (30 U.S.C. 819(a)). In these circumstances, we submit that it is exceedingly improbable that Congress would have declined to enact the civil penalty provisions in the absence of the reimbursement clause.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
Assistant to the Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

RONALD G. WHITING
Associate Solicitor

LOIS G. WILLIAMS
JOSEPH M. WOODWARD
Attorneys

AUGUST 1979

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

JERRICO, INC., PLAINTIFF

v.

U. S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

ORDER

Upon consideration of plaintiff's motion for summary judgment, the memoranda filed in support thereof and opposition thereto, argument of counsel in open Court, and for the reasons set forth in the Court's Memorandum issued this day, and it appearing to the Court that there are no genuine issues of material fact, it is by the Court this 7th day of May, 1979,

ORDERED that plaintiff's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED and DECLARED that section 16(e) of the Fair Labor Standards Act, 29 U.S.C. § 216 (e) (1976), violates the due process clause of the fifth amendment to the United States Constitution; and it is further

ORDERED that defendants be, and hereby are, enjoined from enforcing section 16(e) of the Fair

Labor Standards Act, 29 U.S.C. § 216(e) (1976), against plaintiff and are further enjoined from requiring the payment of civil money penalties assessed against plaintiff.

/s/ Oliver Gasch
Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

JERRICO, INC., PLAINTIFF

v.

U. S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

MEMORANDUM

The plaintiff in this action challenges the constitutionality of a provision of the Fair Labor Standards Act (FLSA). It alleges that section 16(e) of the FLSA, 29 U.S.C. § 216(e) (1976), violates due process by mandating the use of civil money penalties collected for violations of the child labor laws as reimbursement for the cost of enforcing the child labor law. Plaintiff contends that the statutory scheme which permits penalties received to be deposited to the credit of the division of the Department of Labor which supervised the assessment of the penalties creates an impermissible potential for bias. On May 24, 1978, this Court denied defendants' motion to dismiss. After the close of discovery, plaintiff moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants have opposed the motion on the basis that there exist genuine issues of material fact and that plaintiff as a matter of law is not entitled to judgment.

Oral argument on plaintiff's motion was heard by this Court March 19, 1979.

BACKGROUND

Plaintiff is a Delaware corporation engaged in operating restaurants throughout the southeastern United States. The Department of Labor investigated several of plaintiff's restaurants prior to 1975, and discovered various violations of the child labor provisions of the FLSA, of which plaintiff was duly notified. These discoveries led to a chain-wide investigation of plaintiff's restaurants in 1975. The investigation revealed that 169 minors had been or were then currently employed by plaintiff. The Assistant Regional Administrator for the Employment Standards Administration, Wage and Hour Division of the Department of Labor, assessed civil money penalties in the amount of $103,000 against plaintiff, pursuant to section 16(e) of the FLSA.

Plaintiff filed an exception to the determination of the violations, and a hearing was held on January 18 and 19, 1977, in Lexington, Kentucky. The administrative law judge concluded that the existence of the violations was clearly established, but he reduced the amount of penalties assessed from $103,000 to $18,500 on October 5, 1977. Plaintiff then filed this action on January 25, 1978, not as an appeal from the order of the administrative law judge, but solely as a challenge to the facial constitutionality of section 16(e).

MERITS

Section 16(e) provides for assessment of civil money penalties under the child labor laws, and further provides that:

> Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with [29 U.S.C. § 9a].

29 U.S.C. § 216(e) (1976). The statute referred to, section 9a, provides:

> All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States.

Plaintiff argues that these provisions create a situation in which the average person would possibly be tempted to impose civil penalties, and to impose higher penalties.

The due process test in circumstances such as are alleged here was established by the Supreme Court in *Tumey* v. *Ohio*, 273 U.S. 510 (1927). In *Tumey*, v. *Ohio*, 273 U.S. 510 (1927). In *Tumey*, the mayor of a village in Ohio was empowered to assess fines

in the mayor's court. The mayor then received additions to his salary based on the amount of fines and costs imposed on those convicted in his court. *Id.* at 520. The Court held that this procedure violated due process because the situation was one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused. . . ." *Id.* at 532. In *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the Supreme Court invalidated a statutory scheme under which a mayor who also acted as judge levied fines that were paid into the village treasury. The mayor did not receive any part of his salary from the fines, but was responsible for the conducting and financing of village affairs. The Court found that this relationship would have the tendency to make the mayor partisan to maintain the high level of contributions from the mayor's court. *Id.* at 60. This due process test, moreover, applies with equal force to administrative proceedings. K. Davis, Administrative Law Treatise § 12.04 at 250 (1958).

Reflection on the due process analysis used by the Supreme Court in *Ward* and *Tumey* suggests that the crucial consideration is the remoteness of the pecuniary interest alleged to be the biasing influence. For example, in *Dugan* v. *Ohio*, 277 U.S. 61 (1928), the Supreme Court held that due process was satisfied in circumstances in which the mayor of a village had only limited executive duties, even though he had

the power to convict and impose fines for the possession of liquor. The mayor was a member of the city commission which fixed his salary, but he had no vote in the matter. The Court found that the mayor's relationship to the finances and financial policy of the village was too remote to warrant a presumption of bias in the mayor's role as judge. *Id.* at 65. In *Aiello* v. *Wilmington*, 426 F. Supp. 1272 (D. Del. 1976), the court found allegations that the Bureau of Fire's Trial Board had a pecuniary interest in penalizing firemen for infractions too attenuated as a matter of law to fall within the purview of *Ward*. The Trial Board would assess "penalty hours" against errant firemen, which they were required to work off without pay. The court rejected plaintiff's claim that the Trial Board had a direct interest in assessing penalty hours in that only by receiving such "free labor" could the Bureau of Fire stay within its budget. *Id.* at 1292.

The Department of Labor, under the statutes challenged in this action, allocates and distributes funds collected as civil money penalties to various bureaus, offices, services, and divisions for the purpose of reimbursement of child labor obligated funds.[1] The allotments are distributed pro rata based on total obligations incurred in connection with enforcement of the child labor laws.[2] Although the regional of-

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[1] Defendants' Answers to Plaintiff's Interrogatories, No. 2(d).

[2] *Id.* No funds were distributed in fiscal year 1978 or to date in 1979. *See* Defendants' Answers to Plaintiff's Interrogatories, No. 2(c); note 6 *infra*.

fices are not reimbursed in amounts related to the amount of penalties assessed by those offices,[3] they are reimbursed in amounts related to the actual costs of work performed, including salaries and apportioned overhead of the offices.[4] Costs of enforcing the child labor laws, *e.g.*, investigations and ultimately penalty assessments, are, of course, directly related to the amounts assessed in penalties. Greater effort in uncovering violations and fining the violators leads to a greater amount of penalties assessed. Thus, the increased costs of such effort leads to the crediting of a larger share of reimbursements. The Court is persuaded that this direct and tangible relationship between reimbursement and assessment is violative of due process.

The pro rata crediting of sums received as penalties by the Department of Labor to the various bureaus and regional offices charged with imposing those penalties tends to make those offices partisan to maintain a high level of penalty assessment. Clear evidence of this potential biasing effect is the assessment at the regional level of civil money penalties against plaintiff in excess of $100,000. The Assistant Regional Administrator imposed a fine which was nearly the maximum that could have been im-

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[3] Defendants' Answers to Plaintiff's Interrogatories, No. 2(g).

[4] *See* Defendants' Answers to Plaintiff's Interrogatories, No. 2(e).

posed under the statute.[5] For fiscal 1977, the year following the initial imposition of penalties in this case, the regional office in Atlanta, which had jurisdiction over plaintiff, was allotted $39,200 as its pro rata share of total penalty funds received.[6] The propensity of this relationship between assesment and allotment of penalties to create an atmosphere that permits less than objective balancing of alleged violations against proposed penalties does not comport with the notions of fairness inherent in due process of law.

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[5] Section 16(e) provides a maximum penalty of $1,000 for each violation of section 212 of the same title. 29 U.S.C. § 216(e) (1976).

[6] Defendants' Answers to Plaintiff's Interrogatories, No. 2(c), sets out the disbursement of penalty funds:

Date	Funds Allotted	Distribution
Transition Qtr.	$ 82,578	
6/8/76	47,886	
6/28/76	16,735	
Total FY 1976	$147,199	National Office—W-H
FY 1977	$194,800	National Office—W-H
	5,700	Boston—W-H, Reg. Ofc.
	10,800	New York—W-H, Reg. Ofc.
	11,900	Phila.—W-H, Reg. Ofc.
	39,200	Atlanta—W-H, Reg. Ofc.
	44,300	Chicago—W-H, Reg. Ofc.
	21,300	Dallas—W-H, Reg. Ofc.
	9,000	Kansas City—W-H, Reg. Ofc.
	4,900	Denver—W-H, Reg. Ofc.
	12,400	San Fran.—W-H, Reg. Ofc.
	5,500	Seattle—W-H, Reg. Ofc.
	200,000	Solicitors Office (SOL)
Total FY 1977	$559,800	
FY 1978	—	Held in Treasury
FY 1979	—	Held in Treasury

Defendants maintain that there is no possible biasing influence on the administrative law judges who hear child labor cases and are empowered to determine whether the amount of penalties assessed by the regional officer was correct. Defendants observe that the Office of Administrative Law Judges hears cases arising under approximately 55 statutes, with child labor cases representing approximately 1.3% of the total number of cases docketed under those statutes.[7] Moroever, no administrative law judge has been hired solely for the purpose of hearing child labor cases,[8] and the Office of Administrative Law Judges receives no pro rata allotment of the total amount of civil money penalties imposed. Thus, the interest of an administrative law judge in assessing or affirming the imposition of penalties is too remote to warrant the conclusion that due process requirements are not met at the administrative law judge level.

The absence of due process infirmities in child labor proceedings before the administrative law judge, however, does not vitiate the conclusion that the statutory scheme at issue is itself violative of due process. The Supreme Court has firmly established that unfairness at the "trial" level cannot be corrected by the existence of appeal procedures, or even by the availability of a trial *de novo*. *Ward*, *supra*, at 61. The Court emphasized that a party "is entitled to a neutral and detached judge in the first instance." *Id.* at 61-62. Since civil money penalties are assessed in the first instance by regional officials whose office is subsequently allotted a portion of penalties received, plaintiff in this case did not receive in the first instance access to a "neutral and detached judge." Without providing fundamental fairness at the most basic level of dispute resolution, the statute under which plaintiff was eventually required to pay fines cannot meet the constitutional requirements established by *Ward* and *Tumey*. The interest of regional officials is not so remote as that discussed in *Aiello*, *supra*, and *Dugan*, *supra*. The relationship between assessment of penalties and allotment of funds is direct, clear, and creates an impermissible potential for bias in the initial decision-making process.

Section 16(e) is unique in the constellation of federal statutory procedures. No other statute provides for the crediting to enforcing agencies of civil money penalties assessed against violators. Most such penalties are paid directly into the Treasury of the United States. *E.g.*, The Occupational Safety and Health Act, 29 U.S.C. § 666(k) (1976).[9] Some funds are specifically designated for a particular purpose. *E.g.*, The Water Quality Improvement Act of 1970, 33 U.S.C. § 1321(k) (1976) (established a revolving fund into which fines received are deposited to defray the cost of oil removal resulting

[7] Defendants' Answers to Plaintiff's Interrogatories, No. 3.

[8] Defendants' Answers to Palintiff's Interrogatories, No. 4.

[9] *See* Defendants' Opposition to Motion for Summary Judgment, at 20.

from oil spills). Section 16(e), in contrast, mandates the designation of fines received to the office charged with imposing the fines, in relation to the costs of enforcing the child labor laws. This statutory anomaly is the result of the incorporation in section 16(e) of a provision requiring the repayment to the Department of Labor of the "actual cost" of statistical studies conducted for private parties. *See* 29 U.S.C. § 9 (1976). Monies received as reimbursement for such costs are to be used to defray the ordinary expenses of the agency. *Id.* § 9a. This procedure is perfectly suitable to the context for which it was originally enacted, that is, the conducting of studies by the Department of Labor, which has greater resources and capacity to conduct such studies than most private entities. The transplanting of such a scheme, however, to the context of assessment of civil money penalties, which involves important rights of alleged violators of the child labor laws, creates a situation in which bias may creep into the decisions of the regional officials who impose those penalties. Thus, the peculiar statutory format of section 16(e) unconstitutionally deprives plaintiff and others of due process. The more appropriate procedure is simple and constitutionally sound: pay all civil money penalty funds directly into the Treasury of the United States. To allow only the Department of Labor to deviate from such a clear procedural alternative, to the detriment of alleged violators, would be to disregard the fundamental tenets of our legal system.

In short, in view of the indisputably impermissible biasing influence created by section 16(e) of the FLSA, this Court is constrained to declare that section 16(e) violates the due process clause of the fifth amendment. Accordingly, defendants will be permanently enjoined from enforcing section 16(e) against plaintiff and from requiring payment of the civil money penalties assessed against it.

/s/ Oliver Gasch
Judge

Date: May 7th 1979

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

JERRICO, INC., PLAINTIFF

v.

U. S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the Defendants in the above captioned case hereby appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1252, from the final judgment declaring Section 16(e) of the Fair Labor Standards Act (29 USC 216(e)) unconstitutional entered on May 7, 1979.

Dated this 17th day of May, 1979.

CARIN ANN CLAUSS
Solicitor of Labor

RONALD G. WHITING
Associate Solicitor
General Legal Services

PAUL E. MYERSON
Counsel for Employment
Standards

MARCIA A. LURENSKY
Attorney

By: /s/ Marcia A. Lurensky
United States Department
of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing NOTICE OF APPEAL was mailed on this 17th day of May, 1979 to Thomas W. Power, Attorney for Plaintiff, 1666 K Street, N.W., Suite 611, Washington, D.C. 20006.

/s/ Marcia Lurensky
MARCIA LURENSKY
U. S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Telephone: (202) 523-8244

APPENDIX D

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGE
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-CL-105

[SEAL]

IN THE MATTER OF:

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, PLAINTIFF

v.

JERRICO, INC., RESPONDENT

ROBERT C. HAYNES, ESQUIRE
Office of the Solicitor
U.S. Department of Labor
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Nashville, Tennessee 37203

ELIZABETH S. BONFILS, ESQUIRE
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For the Plaintiff,

THOMAS W. POWER, ESQUIRE
Robert D. McDonald, Esq.
1666 K Street, N.W.
Suite 611
Washington, D.C. 20006

CURTIS L. WILSON, ESQUIRE
Jerrico, Inc.
1949 Nicholasville Road
Lexington, Kentucky 40503
For the Respondent.

Before: PETER MCC. GIESEY
Administrative Law Judge

DECISION AND ORDER

This is a proceeding brought under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, *et seq.* (hereafter "the Act")[1] and Regulations pro-

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[1] Specifically, section 216(e);

(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

(1) deducted from any sums owing by the United States to the person charged.

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which

mulgated by the Secretary of Labor pursuant to authority under the Act.

A hearing was held on January 18 and 19, 1977 in Lexington, Kentucky. Briefly, the record shows the following.

Statement of the Case

The facts are undisputed unless otherwise indicated.

Jerrico, Inc. is engaged in the business of establishing, managing and operating restaurants. The annual gross volume of business during the relevant period herein (1974 and 1975) exceeded $250,000 yearly. Jurisdiction under the Act is not in issue.

Among the restaurants operated by Jerrico, Inc. are 39 or 40 enterprises trading as "Jerry's, located in Kentucky, Indiana, Tennessee, Georgia and Florida.

In 1969, an investigation of "Jerry's," Harrodsburg road, Lexington, by a Department of Labor

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the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, United States Code and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes" (29 U.S.C. 9a).

compliance officer disclosed that a 15 year old waitress had worked later than 7 p.m. in violation of Child Labor Regulation number 3.[2] The compliance officer testified that he delivered a notice (form 103) to the corporation controller.

In June, 1971, a one page summary of Regulation number 3, on corporate letterhead paper, was circulated to restaurant managers.

In July, 1973, following an investigation at a restaurant known as "Jerry's #7" in Lexington, Kentucky, the investigating officer notified the manager that four busboys under the age of 16 had worked after 7 p.m. in violation of Regulation number 3. The manager testified that within two weeks of this notice, he received "a memo from the main office to comply with the law or get out."

Following an investigation of "Jerry's #2" in Lexington, a compliance officer notified a corporate

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[2] 29 C.F.R. 570.35(a), *viz.*;

. . . [employment of minor employees between 14 and 16 years of age] shall be confined to the following periods:

(1) Outside school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer . . . when the evening hour will be 9 p.m.

* * *

vice president, in December, 1974, of the fact that two waitresses at that restaurant had worked later than 7 p.m. in violation of Regulation number 3.[3]

Following an investigation of 5 or 6 of respondent's restaurants, in March, 1975, the investigating officer notified respondent's regional manager that two employees under the age of 16 were employed in the kitchens of two restaurants in Shelbyville, Kentucky, in violation of Regulation number 3.[4]

In June, 1975, a compliance officer went to Jerrico's home office in Lexington to investigate two restaurants. Finding violations of the child labor regulations, he determined that the investigation should be broadened to include all of the "Jerry's" restaurants in the five state area mentioned, *supra*. The

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[3] The corporate officer testified that he could not recall the occasion.

[4] 29 C.F.R. 570.34(b)

* * *

Paragraph (a) of this section [permitted occupations] shall not be construed to permit the application of this subsection to . . . the following occupations in . . . food service . . . establishments.

* * *

(5) Cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking.

* * *

Although the compliance officer who conducted this investigation testified, he did not state whether these violations involved prohibited hours or prohibited occupations. The form 103's identify the violations only as "CL Reg. 3."

investigation covered employment during the two year period from June, 1973 to June, 1975. On August 1, 1975, the compliance officer notified corporate counsel that the investigation disclosed that 169 minors had been, or were presently, employed by respondent in violation of the child labor provisions of the Act.

Briefly, the violations consisted of:

1. Employment of 7 persons under the age of 14.
2. Employment of 162 persons under the age of 16 for periods and at hours forbidden by Regulation number 3.
3. Employment of two of the above 162 persons in occupations not permitted by Regulation number 3.

In due course a penalty was assessed against respondent. The assistant regional administrator calculated the penalties, giving consideration to factors set forth in section 216(e) of the Act and Regulations (29 C.F.R. 579.5) promulgated by the Secretary for such purpose.

The penalties were as follows:

Violation 1	$ 2,100
Violation 2	16,200
Violation 3	200

added to this amount was the sum of $84,500, representing $500 for each of the 169 persons employed for periods and under conditions similar to those

found in previous investigations of respondent's restaurants.[5]

At the hearing, respondent's corporate officers who testified professed ignorance of violations of the child labor section of the Act earlier than those of which they were notified following the latest investigation.

Nevertheless, it is undisputed that, within the year following notification of a corporate officer (who did not testify) of the violations which occurred in 1969, some responsible officer at respondent's corporate headquarters circulated a summary of the Act's child labor requirements to restaurant managers. The manager of a restaurant at which violations were discovered in 1973 received a memo "from the main office" shortly after the conclusion of the investigation advising him "to comply with the law or get out."

Respondent's vice president testified that it was "very difficult to effect compliance with the law," explaining that at 6:30 and 9:00 p.m., "the restaurant is going 120 percent" because this is the dinner hour. According to the witness, "a manager under pressure is not going to tell a [minor] to go home."

He also explained that violations of this nature were not as obvious at the corporate headquarters as

[5] 29 C.F.R. 579.5(c), *viz.*;

> In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity the violation or violations, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations.

the testimony of one of plaintiff's witnesses suggested. Thus, although employee's time cards bear, *inter alia*, their dates of birth, the timecard is not submitted to headquarters until a week after the payroll has been prepared because each restaurant manager submits a weekly "computer sheet" from information on the timecards, which compilation serves as the payroll source.

Respondent's general counsel testified that the workforce turnover during the two years covered by the investigation was in excess of 8,500 persons and that the turnover from 1969 to 1975 was in excess of 13,500 employees. He also testified that when he was informed, following the 1975 investigation, that 169 violations had been discovered, he realized that "there was a problem in all the stores" that the difficulty was "chain wide." In consequence, he recommended that company policy be changed and that management announce to the restaurant managers that no persons under the age of 16 would henceforth be hired and that currently employed persons under that age be discharged. His recommendations was accepted and the policy was announced in July, 1975. He stated that an additional consequence of the discovery of "chain-wide" violations was the discharge of "2 or 3" restaurant managers.

Findings of fact and Conclusions of Law

Having considered the entire record, including the testimony, exhibits and briefs, and having observed the demeanor of the witnesses, I make the following

findings of fact, conclusions of law and decision and order based thereon.

Jurisdiction is not in dispute.

The facts are set forth, *supra.*

Concerning the disputed question of notice to respondent of violations of child labor Regulations in 1969, 1973, 1974 and 1975, I credit the testimony of the solicitor's witnesses, and find that in each case a responsible agent of respondent was timely notified. That is not to say that I believe respondent's witnesses testified falsely. Rather, I believe that their memories were less precise and that a significant circumstance in this matter is directly related to the substance of such testimony and the reasons therefor.

Thus, the record demonstrates that the earlier violations were regarded by responsible management as isolated, unusual and easily corrected by a combination of education—the 1971 memorandum summarizing requirements—and straightforward exercise of management prerogative—the 1973 direction to the manager of "Jerry's #7" to "comply with the law or get out." I credit respondent's witness' testimony that it was not until notification of the wide-spread violations upon which the instant proceedings are based, that management realized that the problems were "serious" and "chain-wide." Whether management's immediate action to eliminate the circumstances which underlay the violations and discipline some of the responsible restaurant managers was motivated by a desire to avoid the threatened imposi-

tion of a significant money penalty or a public spirited impulse to abide by the Act is of no consequence. The immediate and far-reaching actions taken are, if not probative, at least corroborative of respondent's officials protestations that they sincerely believed that necessary and reasonable corrective action had long since been taken and that violations which had been minor and infrequent in the past had ceased as a result of measures reasonably calculated to correct the underlying causes.

Another circumstances which I perceive to have been afforded greater weight than warranted was the presence of a birth date on each timecard examined by the compliance officer. Thus, asked when he reached the conclusion that the violations were willful, he replied, ". . . when I saw the extent [and] nature . . . and I saw that here we had violations on the face of the record and we had 20 at [a] time . . . and the indication of the violations were contained in the date of birth and the information [was] available on the time cards [,] the Employer had knowledge . . . ." Plainly, he assumed that each week some agent of respondent, in making up the payroll, read or could have read information showing that the employee was a minor and at the same time calculated a pay check representing what could not be mistaken for anything but payment for working an unlawful number of hours or hours during which employment was prohibited or both. The record shows, however, that this was not the case. Rather, the payroll was prepared from "computer sheets"

and the time cards, which did indeed show violations on their face, were submitted a week later only to serve as base records consulted in the event of erroneous calculations or other circumstances requiring the checking of bases for events (payment) which had already occurred.

These circumstances are not exculpatory. Nevertheless, they explain the circumstances underlying the assessing officer's conclusion that the violations were repeated and willful. Accordingly, to the extent that the judgment concerning willfulness rests upon these matters, I must disagree.

What the record reveals is a course of violations, first disclosed in the 1969 investigation. From that time until the disclosure of "chain-wide" violations in the instant case, management had no reason to believe that corrective actions taken were ineffective. With the exception of the 1971 memorandum corrective action was selectively directed to what management reasonably believed to be isolated instances of violations of the child labor regulations. I do not question the Secretary's assertion that management could have discovered his continuous and wide-spread course of conduct engaged in by its managers. Perhaps the record discloses evidence of poor management. If so, it is not so poor as to become "willful." I am unwilling to base a determination in a mixed matter of fact and law upon business judgment in a field in which neither I nor the Secretary possess expertise. It begs the question to assert that it need not be proved that respondent had evil intent. It must

be shown that respondent knew of the violations or should have known of the violations by the exercise of reasonable care. The record shows that, before learning that the violations were "chain-wide," respondent took steps reasonably calculated to stop current violations and prevent further abuse. Similarly, learning of the extent of violations in 1975, it took swift and appropriate action. In short, I find that the Secretary has not established a record upon which to base a reasonable determination that the violations were willful or that Jerrico's management failed to to take reasonable precautions to avoid violations.

That the violations occurred is undisputed. Respondent's responsibility cannot be disputed. Nor can respondent dispute the fact that at the time of the violations, the statute provided that "[a]ny person who violates the provisions . . . relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty not to exceed $1,000 for each such violation." In these circumstances, it does not lie in respondent's mouth to assert that because the violations occurred before the Secretary promulgated guidelines for the determination of the amounts of penalties, no penalties may be assessed. Ironically, the guidelines complained of served to reduce the penalty assessed below that authorized by the statute. Nor were the regulations applied retroactively. In the process of administering the Act, the last process is the assessment of the penalty. The process was accomplished after the effective date of the regulations. The position of respondent that it

is somehow prejudiced by having been penalized in an amount less than the $169,000 which reading the statute would have disclosed was its maximum exposure when the violations occurred is sound in neither law nor logic.

Finally, respondent has failed to show that the elements considered by the Secretary and the methods employed in arriving at the amount of the penalty were in any way unreasonable or arbitrary.

ORDER

I affirm the determination of the Secretary that the violations for which a penalty was assessed did occur.

Jerrico, Inc. shall pay forthwith, in accordance with the Act and regulations thereunder, a penalty in the amount of $18,500.

/s/ P. McC. Giesey
PETER McC. GIESEY
Administrative Law Judge

Dated: October 5, 1977
Washington, D.C.

RETURN OF SERVICE

I hereby certify that a duplicate/original of the within *DECISION AND ORDER* was sent by certified mail to the person named herein on ————————.

————————————
(Name of Person making service)

————————————
(Official title)

CERTIFIED MAIL

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